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C O N F I D E N T I A L SECTION 01 OF 04 NAIROBI 000029

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E.O. 12958: DECL: 2020/01/08
TAGS: [PREL](#) [PGOV](#) [KDEM](#) [KE](#)
SUBJECT: Constitutional Debate 5: Power to the People

REF: 09 NAIROBI 2666; 09 NAIROBI 2531; 09 NAIROBI 2533
09 NAIROBI 2539; 09 NAIROBI 1711

CLASSIFIED BY: Michael E. Ranneberger, Ambassador, DOS, EXEC; REASON:
1.4(B), (D)

11. (C) Summary: This cable is part five in a five part series on
the contentious issues

and political landscape surrounding the debate on Kenya's
Harmonized Draft

Constitution. Cable one (Ref A) provided a snapshot of the
outstanding contentious issues

in the draft constitution: executive authority, devolution,
judicial reform, and

the Kadhi's courts. Cable two (Ref B) analyzed the influential
voices, political position,

and strategy of President Kibaki's Party for National Unity (PNU) in
respect to the

draft; an analysis of Prime Minister Raila Odinga's Orange
Democratic Movement

(ODM) followed in cable three (Ref C). Cable four (Ref D) reported
on the efforts of moderates,

both within and outside of the two major parties, to broker a
compromise between

hardline ODM and PNU positions. This cable assesses the dynamics of
public opinion

and special interest groups in the context of the upcoming national
referendum on

the draft constitution.

12. (C) Summary continued: The thirty day public comment period on
the Harmonized Draft

Constitution closed on December 17; during that time the Committee
of Experts (COE)

responsible for the draft received hundreds of thousands of
proposed revisions. The

COE, Parliamentary Select Committee (PSC), and ultimately
Parliament are now

mandated with preparing a final draft that will be put to a
national referendum.

Despite strong public support for a new constitution, the public is
poorly informed

about the content of the current draft, and divided as to whether they will vote

for or against. Should the PNU and ODM fail to reach consensus on the draft, one

or the other parties will seek to defeat the draft by mobilizing public opposition

around wedge issues such as the inclusion of Islamic Kadhi courts in the draft.

Logistically, the Independent Interim Electoral Commission (IIEC) has not yet begun

the process of voter registration, making a planned April referendum impossible.

Observers believe a July or August date for the referendum is more likely. End

Summary.

PUBLIC INPUT PROCESS UNCLEAR, VOTERS UNINFORMED ON CURRENT DRAFT

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13. (C) Kenya's first attempt at constitutional reform, the 2004 "Boma's draft," began

with an extensive program of public consultations throughout the country that

informed the drafting process. The Boma's process failed when the draft was rewritten

by the Attorney General and voted down in a referendum. For this iteration, the

Committee of Experts was mandated first to find consensus solutions to the contentious

issues that had frustrated previous drafts (Ref A), and then release a

proposed draft for public comment. After a slow start in which many Kenyans complained

they were unable to obtain a copy of the Harmonized Draft Constitution, individuals and

interests groups mobilized to present their views to the COE by the December 17

deadline. The COE received hundreds of thousands of comments, but there has been

no clear process to consider and weigh the opinions received. A member of the

Parliamentary Select Committee (PSC), which will receive a revised draft for review

on January 8, remarked to Poloff that the COE is likely to make only cosmetic

changes to their original draft in response to the public comments.

14. (C) Despite strong interest and support for a new constitution, most citizens do not

feel that they are well-informed on the content in the proposed draft. A national

survey conducted at the end of the public comment period in December found that

two-thirds (64%) of Kenyans say that they are not familiar with the contents of the

draft. Reflecting public unfamiliarity with the draft, one-third of Kenyans say

that they will vote for the draft in the referendum (34%), three-in-ten plan to

vote against (29%), and a plurality (37%) are undecided.

ABSENT COMPROMISE, REFERENDUM WILL BE DIVISIVE

15. (C) The referendum process will be divisive and possibly violent if PNU and ODM

principals fail to reach a consensus position on executive authority and the

structure of government by the time the draft is voted out of Parliament in early

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March (Ref D). Whichever party feels disadvantaged by the draft presented to voters will have

a strong incentive to campaign against it. As a member of the PNU negotiating team observed to

Poloff, "As we saw in the last constitutional referendum, it is far easier to campaign against a

draft than it is to support - all you have to do is go to different communities and tell them that

their interests will be harmed in the proposed constitution. For example if I go

to a Maasai village and tell them that communal grazing land will be turned into

private shareholdings, they will all vote against the draft."

16. (C) If either party decides to pursue a rejectionist campaign, their likely strategy

will be to politicize minor but emotive clauses in the draft. The most sensitive

wedge issue at this point is the inclusion of Islamic Kadhi's courts in the draft

(Ref E). Although the Kadhi's courts are recognized under the current constitution

and the draft carries over the same relevant clauses, evangelical and pentecostal

Christian leaders are mobilizing public opposition to the inclusion of the courts

in the current draft. In a meeting with the Ambassador, influential bishops and

pastors were emphatic that the inclusion of Kadhi courts in the draft is indicative

of an Islamist agenda, and were confident that Kenya's eighty percent Christian

public would vote down the draft on their instructions. (Note: the Ambassador

pointed out that such a move would be self-defeating, as it would guarantee the

continuation of the Kadhi courts under the current constitution while denying

Kenyans the political reforms contained in the draft. End note.) Despite the nonpartisan

(though overtly religious) rhetoric used by the Christian leaders, several

sources have confirmed that elements within the PNU are funding and encouraging the

anti-Kadhi campaign. The PNU views the Kadhi's issue as a useful red herring that

could lead to defeat of the draft without overt involvement by the party.

17. (C) In a worst-case scenario, groups strongly opposed to the draft could engage in

sporadic violence. Violence around the referendum is not likely to be as extensive

or severe as the post-election crisis in 2008, but it could occur in the same areas

and it would reopen unhealed wounds and grievances between communities.

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LOGISTICS FOR REFERENDUM NOT YET IN PLACE

18. (C) Political debates aside, the Independent Interim Electoral Commission (IIEC),

which is mandated with administering the constitutional referendum, is not on track

to mount a referendum by the planned April date. The IIEC is in the midst of

hiring middle and senior management staff. In February the IIEC will begin voter

registration from scratch, a process that will take at least two to three months.

(Note: After the election crisis, Parliament declared the current voter register

null and void and ordered a completely new registration exercise.
Some contacts

are suggesting that if creation of a new register proves too
costly, time-consuming,

or cumbersome, the IIEC will merely update and "revalidate" the old
flawed register. End Note) Most observers agree that the referendum
will likely be

held in August.

19. (C) Comment: Post continues to urge both the President and Prime
Minister to reach a

consensus position on executive power and jointly champion the
draft during the

referendum period. Recent calls by the Secretary to Odinga and
Kibaki (reported septel) were very

useful in driving home the urgent need for compromise. Post is also
reaching out to

groups whose focus on wedge issues - such as the Kadhi courts -
threatens broader

political reform, and is providing technical assistance to the
IIEC. End Comment.
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